Supreme Court, U.S.
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No. 09-628

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD VEZINA, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner frames the following question to this Court:

Should the U.S. Supreme Court grant certiorari or otherwise hold this case in abeyance pending the Court's decision in Padilla v. Kentucky, No. 08-651, cert. granted, 129 S. Ct. 1317 (Feb. 23, 2009), oral argument held Oct. 13, 2009, which raises an issue substantially identical to that presented here, i.e., if a criminal defense attorney falsely advises a non-citizen client that his plea of guilty will not result in deportation, can that misadvise constitute ineffective assistance of counsel under the Sixth Amendment?

Respondent restates this question as:

Whether this Court should exercise its jurisdiction to review a state court decision when the certiorari petition was untimely filed with this Court, when the issue was untimely presented to the state courts, and when it is a factually different issue than that found in Padilla.

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No. 09-628

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD VEZINA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Respondent, the State of Florida, respectfully asks this Court to deny the petition for writ of certiorari seeking review of the opinion of the Supreme Court of Florida.

OPINIONS BELOW

The plea hearing at issue is included as Appendix A (A). The postconviction motion is included as Appendix B (B), the State of Florida's response is included as Appendix C (C), the trial court order denying the motion is Appendix D (D), Petitioner's motion for rehearing is Appendix E (E), the State response to that motion is Appendix F (F), and the order denying the motion for rehearing is Appendix G (G). The *per curiam* decision of the Fifth District Court of Appeal of Florida, Vezina v. State, 12 So.3d 237, 2009 WL 2152544 (Fla. 5th DCA, June 23, 2009), (Table, Text in WESTLAW), Unpublished Disposition, is included as Appendix H (H). The petition for certiorari in the Florida Supreme Court is Appendix I (I), and the order of the Florida Supreme Court dismissing the petition for writ of certiorari, Vezina v. State, 17 So.3d 1226, 2009 WL 2620068 (Fla., August 26, 2009), (Table, Text in WESTLAW), Unpublished Disposition, is included as Appendix J (J).

JURISDICTION

Petitioner seeks review under 28 U.S.C. § 1257. However, pursuant to the Rules of the Supreme Court of the United States, Rule 10, Petitioner cannot invoke jurisdiction as a matter of right. Given that the instant petition was untimely filed, given that the issue was presented to the trial court in an untimely postconviction motion, and given that the issue is factually

distinguishable from that of Padilla which is pending before this Court, Petitioner has failed to show a compelling reason for Florida's decision to be reviewed, and this Court should not exercise jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner is seeking review under the Sixth and the Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE AND FACTS

On February 20, 1998, Petitioner entered a best interest guilty plea for possession of cocaine in exchange for eighteen months of probation. (A). Specifically, the following plea colloquy occurred:

> THE COURT: All right. Well, you're here today charged with the criminal offense of possession of cocaine. It's a crime punishable by up to five years in prison. You have all the rights that – if, have you been here a while this morning, you've heard me say probably six or seven times so far, but I'm going to go over them with you.
>
> You have the right to a jury trial, at which the State would have to prove the case against you beyond and to the exclusion of every reasonable doubt. You don't have to do anything or say anything. It's up to the

State to prove the case against you.

You are represented by an attorney. And you do have a very experienced lawyer representing you. If you couldn't afford to hire a lawyer then I would appoint a lawyer to represent you.

You don't have to do anything or say anything. It's the obligation of the State to prove the case against you to a unanimous jury verdict beyond a reasonable doubt.

Sir, I'm showing you the form we call a plea form. Sir, do you recognize it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you read it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you sign it?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand it?

THE DEFENDANT: Yes, sir.

THE COURT: How far did you go to school?

THE DEFENDANT: Three years in college.

THE COURT: Okay. I have to tell you that if you're not a citizen of the United States, this plea could be used to deport you. If you're on probation, this plea could be used to violate your probation.

Is it your desire, sir, to give up your rights contained in this plea form and enter your plea today of no contest to possession of cocaine?

THE DEFENDANT: Yes, your Honor.

THE COURT: Has anybody promised you anything other than what you have heard me say to get you to plead?

THE DEFENDANT: No.

(A 3-5).

Petitioner completed his eighteen months of probation; however, on October 23, 2008, over ten years after his plea, he filed through counsel a motion to set aside the plea and vacate sentence. (B). In that motion, Petitioner submitted that before accepting any plea a trial court should advise a defendant of the possibility of deportation. (B). He, then, admitted the court warned him that his plea could be used to deport him; however, he alleged that the court did not determine if he understood

the court's warning. (B 2). Petitioner goes further and asserted that his attorney affirmatively advised him that his plea would not expose him to deportation. Petitioner cited Florida v. Green, 944 So. 2d 208, 209 (Fla. 2006), noted that it was decided on October 25, 2006, and asserted that Green gave him two years to file the motion in state court.

The State of Florida filed a Response which made several arguments. (C). First, it noted that Petitioner had been informed that the plea could be used to deport him. (C 2). The Response also pointed out that Petitioner had specifically stated that no one had promised him anything different than that set out in the plea agreement and as explained during the plea colloquy. (C 2). Additionally, the prosecutor noted that Petitioner's claim was not that he was being deported but that the conviction acted to deny him permanent, lawful residence. (C 3). Given this fact, the State asserted that the motion was legally insufficient under Florida law as set out in Green.

On December 16, 2008, the trial court entered an order denying the motion. (D). Petitioner filed a motion for rehearing (E) asserting that Green had no application to his case; instead, his claim was one of ineffective assistance of trial counsel citing Rensoli v. Florida, 718 So. 2d 1278 (Fla. 3d DCA 1998), in support. Additionally, Petitioner submitted that his assertion was not just that of possible deportation but also of other deportation consequences. The State filed a Response (F) noting that when the trial court had specifically asked whether

anyone had made any other promises to encourage Petitioner to plea Petitioner had said under oath there had not been.

The trial court denied the rehearing motion, and Petitioner appealed to the district court of appeal. Without ordering a response from the State, the appellate court *per curiam* affirmed the trial court in a decision issued on June 23, 2009. (H). Mandate issued from the appellate court on July 17, 2009.

Petitioner next filed a petition for writ of certiorari in the Florida Supreme Court on August 21, 2009. (I). On August 26, 2009, the Supreme Court of Florida dismissed the writ specifically noting that it was without jurisdiction. (J).

Most recently, on November 24, 2009, Petitioner filed the instant writ of certiorari requesting this Court accept jurisdiction. The State of Florida's response follows.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD NOT ACCEPT JURISDICTION BECAUSE THE PETITION WAS UNTIMELY FILED WITH THIS COURT, THE ISSUE WAS UNTIMELY FILED IN THE STATE COURTS, AND IT IS FACTUALLY DISTINGUISHABLE FROM PADILLA.

Petitioner submits that the issue in this case is the same as the one addressed by this Court in Padilla v. Kentucky, no. 08-651, cert. granted, 129 S. Ct. 1317 (Feb. 23, 2009). Respondent asserts that this Court should not accept jurisdiction for three reasons: the petition is untimely filed, the issue was untimely pled to the state courts, and the instant case is factually distinguishable with Padilla.

First, as to the timeliness of the petition, this Court has held as follows:

> The law states that the "time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by the rules of the Supreme Court." 28 U.S.C. § 2101(d). Those Rules provide that "[a] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort ... shall be deemed in time when it is filed with the Clerk of

> this Court within 90 days after the entry of judgment," Rule 13.1. This period may be extended by a Justice of this Court "for good cause shown" for a period not to exceed 60 days, Rule 13.2, but an application for such an extension "is not favored," Rule 13.6.

Madden v. Texas, 498 U.S. 1301 (1991). Florida law provides that in an appeal from the state appellate court's affirmance of a conviction, a *per curiam* affirmance is not reviewable by the Florida Supreme Court. See Jenkins v. Florida, 385 So. 2d 1356, 1359 (Fla. 1980); see also Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 107 S.Ct. 1046, 1048 n. 4, 94 L.Ed.2d 190 (1987) (acknowledging "[u]nder Florida law, a *per curiam* affirmance issued without opinion cannot be appealed to the State Supreme Court" such that the petitioner sought review directly in the Supreme Court).

Petitioner's appeal to the district court of appeal was *per curiam* affirmed on June 23, 2009. (H). Ninety days from that date would be September 21, 2009. The instant petition was not filed until November 24, 2009. The attempt to seek certiorari of the *per curiam* affirmance clearly was in violation of Florida law; hence, the Supreme Court of Florida dismissed the writ. (J). Furthermore, throughout this process, Petitioner has been represented by counsel. In Florida case law clearly set out almost thirty years ago that the Supreme Court of Florida had no jurisdiction over *per curiam* affirmances. Jenkins, 385 So. 2d at 359 ("Accordingly, we hold that

from and after April 1, 1980, the Supreme Court of Florida lacks jurisdiction to review *per curiam* decisions of the several district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court. The application for review in the instant case having been filed subsequent to March 31, 1980, it is therefore dismissed.") Petitioner's improper attempt to seek review in the Supreme Court of Florida should not toll Petitioner's ninety (90) day period. Therefore, his petition before this Court would be over two months late.

Secondly, Petitioner's attempt to seek review in the Supreme Court of Florida was untimely filed. The decision of the district court of appeal was issued on June 23, 2009. (H). By Florida Rule of Appellate Procedure 9.120(b), Petitioner had thirty (30) days to file a notice to invoke the jurisdiction of the Supreme Court of Florida. So, Petitioner had until July 23, 2009; however, he did not file the improper writ until August 21, 2009, nearly a month, late.

Thirdly, the motion filed in the state trial court was filed over ten years after his plea. Florida clearly has a two year limit for raising ineffective assistance claims under Florida Rule of Criminal Procedure 3.850. While there are exceptions to that time limitation, Petitioner does not fall into them. Petitioner's attempt to justify his late motion was to argue that the two year period did not

begin to run until the defendant first learned of the threat of deportation. (B 10). What Petitioner was trying to do was shoehorn himself into the limited exception Florida created in Peart v. Florida, 756 So. 2d 42 (Fla. 2000) (determining that the two-year limitation period for raising a claim of failure by the court to advise a defendant of deportation consequences of a plea does not begin to run until the defendant knows or should know of the threat of deportation, because that is when the defendant first could articulate a prima facie case), receded from in Florida v. Green, 944 So. 2d 208 (Fla. 2006). In fact, Petitioner specifically referenced Green in his motion. The reason his situation was not controlled by Peart/Green was that Petitioner was specifically advised, "[i]f you're not a citizen of the United States, this plea could be used to deport you...." (A 5). Given that it was not within the limited exception created in Peart, Petitioner's motion in state court would be untimely filed.

Even if timely filed in this Court and in the Florida courts, this case is still distinguishable from Padilla. First, Padilla pled and was sentenced on October 4, 2002, and filed his post-conviction motion in August of 2004 which was within the three year period set out under Kentucky's procedural rules. See Kentucky Rule of Criminal Procedure 11.42. Therefore, unlike Petitioner, Padilla's motion was timely filed.

More importantly, it does not appear Padilla was ever informed by the court that he faced possible deportation consequences. Kentucky v. Padilla, 253

S.W.3d 482 (Ky. 2008). As noted above, Petitioner was specifically told during his plea colloquy that his plea could lead to him being deported. This point is not disputed by Petitioner; instead, he simply alleges that his attorney advised him differently.

Furthermore, Petitioner was asked if he had been promised anything differently than that told to him by the court. Petitioner informed the trial court under oath that he had not. Case law consistently has held that representations by a defendant during a plea hearing should carry great weight - "[T]he representations of the defendant [at the plea hearing], as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977); see also Leroux v. Florida, 689 So. 2d 235, 238 (Fla. 1996) (Supreme Court of Florida noted that possible attorney misadvise would be cured by the trial court addressing the issue during plea colloquy.); Stano v. Florida, 520 So. 2d 278, 280 (Fla. 1988) (Supreme Court of Florida favorably cited the trial court's order which held "Once the Defendant enters a plea of guilty before this Court, and assures the Court under oath that the plea is voluntary, the Court will not go behind the plea. The plea cuts off inquiry into all that precedes it. The Defendant is barred from contesting events happening before the plea."). This, too, appears to differ from the facts in Padilla.

Finally, Petitioner attempts to redefine and expand

the term "deportation." In his motion for rehearing filed in the state court, he basically admitted that there was no imminent threat of deportation. (E 8-9). Instead, the threat to Petitioner is that he is allegedly barred from obtaining permanent resident status. (E 8-9). This just highlights the problem in this area. Petitioner's claim is even more tangentially collateral than that in Padilla. It is not that he is being threatened with deportation; instead, he cannot become a permanent resident. Petitioner's argument would require criminal attorneys not only to be immigration experts for matters at the time of the plea but to also predict indefinitely all future immigration law. Petitioner's plea was over twelve years ago.

Respondent respectfully submits that this type of claim is exactly what the trial court was trying to prevent when it informed Petitioner of possible deportation and why the court asked if other promises or statements had been made to him. Clearly, Petitioner has failed to show why this Court should accept this case given that the petition was untimely filed with this Court, the issue was untimely presented to the state courts, and it is so completely, factually distinguishable from Padilla.

CONCLUSION

For these reasons, Respondent respectfully asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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No. 09-628

IN THE
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RICHARD VEZINA, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

APPENDIX
TO
RESPONDENT'S BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD VEZINA,

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v.

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR OSCEOLA COUNTY, FLORIDA

CASE NO. CR97-1899

STATE OF FLORIDA,

PLAINTIFF,

-VS-

RICHARD JOSEPH VEZINA,

DEFENDANT.

_____/

TRANSCRIPT OF PLEA AND SENTENCING TAKEN ON FEBRUARY 20, 1998, AT THE OSCEOLA COUNTY COURTHOUSE, KISSIMMEE, FLORIDA, BEFORE THE HONORABLE ANTHONY H. JOHNSON, CIRCUIT COURT JUDGE.

APPEARANCES:

HELEN HEIM, ASSISTANT STATE ATTORNEY, 20 S. ROSE AVENUE, SUITE 2, KISSIMMEE; FLORIDA 34741; ON BEHALF OF THE STATE OF FLORIDA.

STEVEN JABLON, ESQ., 808 HASTINGS DRIVE, KISSIMMEE, FLORIDA 34771; ON BEHALF OF THE DEFENDANT.

OFFICIAL COURT REPORTERS
OSCEOLA COUNTY COURTHOUSE
KISSIMMEE, FLORIDA

PROCEEDINGS

THE COURT: OKAY. MR. JABLON, I THINK YOU'RE NEXT. THIS IS MR. RICHARD VEZINA, IS IT?

MADAM CLERK, WOULD YOU SWEAR THE DEFENDANT.

(THE DEFENDANT WAS DULY SWORN.)

THE COURT: OKAY. MR. JABLON, MR. VEZINA IS HERE CHARGED WITH POSSESSION OF COCAINE. AND HOW WOULD HE LIKE TO PROCEED?

MR. JABLON: AT THIS TIME, YOUR HONOR, PURSUANT TO NEGOTIATIONS WITH THE STATE ATTORNEYS OFFICE, MR. VEZINA IS GOING TO BE ENTERING A BEST INTEREST GUILTY PLEA TO THE CHARGE OF POSSESSION OF COCAINE, WITH THE FOLLOWING UNDERSTANDING. HE WILL BE PLACED ON 18 MONTHS DRUG OFFENDER PROBATION, FINE NOT TO EXCEED $500, PLUS COSTS. ADJUDICATION OF GUILT WILL BE LEFT UP TO YOU.

THE COURT: WELL, I HAVE HIS RECORD HERE. I DON'T THINK WE NEED TO TALK ABOUT THAT FOR A LONG TIME, ALTHOUGH MOST OF THIS SEEMS TO BE TRAFFIC.

MR. JABLON: YES. HE HAS ONE PRIOR FOR PURCHASE–

THE COURT: PURCHASE OF COCAINE.

MR. JABLON: --OF COCAINE IN '89, I BELIEVE.

THE COURT: THAT WILL PRETTY MUCH DO IT AS FAR AS ADJUDICATION GOES.
TELL ME YOUR NAME, SIR.

THE DEFENDANT: MY NAME IS RICHARD VEZINA.

THE COURT: WHERE DO YOU LIVE?

THE DEFENDANT: I LIVE IN DEERFIELD BEACH, FLORIDA.

THE COURT: ALL RIGHT. WELL, YOU'RE HERE TODAY CHARGED WITH THE CRIMINAL OFFENSE OF POSSESSION OF COCAINE. IT'S A CRIME PUNISHABLE BY UP TO FIVE YEARS IN PRISON. YOU HAVE ALL THE RIGHTS THAT -- IF HAVE YOU BEEN HERE A WHILE THIS

MORNING, YOU'VE HEARD ME SAY PROBABLY SIX OR SEVEN TIMES SO FAR, BUT I'M GOING TO GO OVER THEM WITH YOU.

YOU HAVE THE RIGHT TO A JURY TRIAL, AT WHICH THE STATE WOULD HAVE TO PROVE THE CASE AGAINST YOU BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT. YOU DON'T HAVE TO DO ANYTHING OR SAY ANYTHING. IT'S UP TO THE STATE TO PROVE THE CASE AGAINST YOU.

YOU ARE REPRESENTED BY AN ATTORNEY. AND YOU DO HAVE A VERY EXPERIENCED LAWYER REPRESENTING YOU. IF YOU COULDN'T AFFORD TO HIRE A LAWYER, THEN I WOULD APPOINT A LAWYER TO REPRESENT YOU.

YOU DON'T HAVE TO DO ANYTHING OR SAY ANYTHING. IT'S THE OBLIGATION OF THE STATE TO PROVE THE CASE AGAINST YOU TO A UNANIMOUS JURY VERDICT BEYOND A REASONABLE DOUBT.

SIR, I'M SHOWING YOU THE FORM WE CALL A PLEA FORM. SIR, DO YOU RECOGNIZE IT?

THE DEFENDANT: YES, SIR.

THE COURT: DID YOU READ IT?

THE DEFENDANT: YES, SIR.

THE COURT: DID YOU SIGN IT?

THE DEFENDANT: YES, SIR.

THE COURT: DO YOU UNDERSTAND IT?

THE DEFENDANT: YES, SIR.

THE COURT: HOW FAR DID YOU GO TO SCHOOL?

THE DEFENDANT: THREE YEARS IN COLLEGE.

THE COURT: OKAY. I HAVE TO TELL YOU THAT IF YOU'RE NOT A CITIZEN OF THE UNITED STATES, THIS PLEA COULD BE USED TO DEPORT YOU. IF YOU'RE ON PROBATION, THIS PLEA COULD BE USED TO VIOLATE YOUR PROBATION.

IS IT YOUR DESIRE, SIR, TO GIVE UP YOUR RIGHTS
CONTAINED IN THIS PLEA FORM AND ENTER YOUR PLEA TODAY OF NO CONTEST TO POSSESSION OF COCAINE?

THE DEFENDANT: YES, YOUR HONOR.

THE COURT: HAS ANYBODY PROMISED

YOU ANYTHING OTHER THAN WHAT YOU HAVE HEARD ME SAY TO GET YOU TO PLEAD?

MR. JABLON: HAVE THERE BEEN ANY OTHER PROMISES GIVEN YOU TO OTHER THAN WHAT'S IN THAT PLEA FORM?

THE DEFENDANT: NO.

THE COURT: STATE, FACTUAL BASIS, PLEASE.

MS. HEIM: YES, YOUR HONOR. ON THE DATE ALLEGED IN THE INFORMATION IN OSCEOLA COUNTY, FLORIDA, MR. RICHARD JOSEPH VEZINA WAS FOUND TO BE IN POSSESSION OF A SUBSTANCE LATER IDENTIFIED AS COCAINE.

THE COURT: OKAY. I DO FIND A FACTUAL BASIS FOR THE ACCEPTANCE OF HIS PLEA. RATHER UNUSUAL FACT PATTERN HERE. BUT I'M GOING TO GO ALONG WITH THE AGREEMENT REACHED BETWEEN YOURSELF THROUGH YOUR LAWYER AND THE STATE OF FLORIDA.

I WILL ADJUDICATE YOU GUILTY OF THE OFFENSE. BUT YOU ALREADY HAVE A FELONY CONVICTION, SO THIS IS NOT GOING TO BE – OR A FELONY POSSESSION OF COCAINE. YOU WERE CONVICTED IN 1989 IN POMPANO BEACH OF THE SAME OFFENSE.

I'M GOING TO PUT YOU ON 18 MONTHS OF DRUG OFFENDER PROBATION, REQUIRE THAT -- YOUR FINE WILL BE $258.

IN A POSSESSION CASE AM I REQUIRED TO IMPOSE THE $250 AND $100 DRUG TRUST FUND ASSESSMENTS, MADAM PROSECUTOR, OR WHICHEVER OF YOU WOULD -- DRUG TRUST FUND ASSESSMENTS IN A POSSESSION CASE, ARE THEY REQUIRED?

MS. HEIM: IT WAS PART OF THE WRITTEN PLEA OFFER, YOUR HONOR.

MR. JABLON: IT WAS.

THE COURT: THEN $250 OSCEOLA COUNTY DRUG TRUST FUND AND $100 F.D.L.E. DRUG TRUST FUND, $258 FINE. SO THAT'S ACTUALLY GOING TO COME OUT TO A FEW DOLLARS MORE THAN THE $500 WE HAD SPOKEN OF.

MS. HEIM: YOUR HONOR, THAT $500 IS IN ADDITION TO THE REGULAR COSTS.

THE COURT: OKAY. SO IT'S A FINE OF $500 PLUS THE COSTS?

MS. HEIM: RIGHT, PLUS THE COSTS.

MR. JABLON: OUR AGREEMENT WITH

THE STATE IS THE STATE HAD AGREED TO UP THE FINE OF $500 TO PERMIT ME TO ARGUE FOR A WITHHOLD OF ADJUDICATION.

THE COURT: THAT'S AN INTERESTING – THAT'S A NOVEL CONCEPT, BUT WHATEVER.

OKAY. THE FINE WILL BE $500; $250 OSCEOLA COUNTY DRUG TRUST FUND; $100 F.D.L.E. DRUG TRUST FUND; 18 MONTHS DRUG OFFENDER PROBATION, WITH THE REQUIREMENT THAT YOU BE EVALUATED FOR DRUG OFFENDER COUNSELING AND YOU UNDERGO WHATEVER COUNSELING IS RECOMMENDED FOR YOU; THAT YOU SUBMIT TO RANDOM URINALYSIS TESTS.

I HAVE TO TELL YOU THIS, SIR. WELL, TO YOUR CREDIT, I DON'T SEE HERE THAT YOU HAVE BEEN BREAKING INTO PEOPLE'S HOUSES OR DOING ANYTHING THAT I REGARD AS A REAL SERIOUS OFFENSE. BUT IF YOU HAVE A DIRTY URINE TEST, YOU WILL BE VIOLATING YOUR PROBATION. AND MR. JABLON WILL TELL YOU I DON'T MESS AROUND WITH THAT PRETTY MUCH. A LOT OF JUDGES IF YOU VIOLATE YOUR PROBATION, THEY WILL PUT YOU BACK ON PROBATION. IF YOU VIOLATE AGAIN, THEY PUT YOU BACK. AND I DON'T DO THAT. AND I'M JUST TELLING YOU NOW SO YOU WILL HAVE'A FAIR WARNING.

OKAY. I DON'T THINK THERE'S ANYTHING ELSE THAT WE NEED TO ADDRESS IN THIS CASE.

SIR, YOU HAVE 30 DAYS WITH WHICH TO APPEAL THE JUDGMENT AND SENTENCE OF THE COURT. GOOD LUCK TO YOU.

PLEASE STEP TO YOUR RIGHT AND DEPUTY GONZALEZ WOULD L I K E T O TAKE YOUR FINGERPRINTS.

THANK YOU, MR. JABLON, FOR BEING HERE TODAY, SIR.

MR. JABLON: NO PROBLEM.

CERTIFICATE OF REPORTER

I, JERI K. CRUSE, REGISTERED PROFESSIONAL REPORTER, CERTIFY THAT I WAS AUTHORIZED AND DID TRANSCRIBE THE STENOGRAPHIC NOTES OF STEPHEN W. FRANKLIN AND THAT THE FOREGOING IS A CORRECT TRANSCRIPT OF THE PROCEEDINGS.

DATED THIS 2ND DAY OF JULY 2007.

/S/

JERI K. CRUSE, RPR

OFFICIAL COURT REPORTERS
OSCEOLA COUNTY COURTHOUSE
KISSIMMEE, FLORIDA

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR OSCEOLA COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

CASE NO. 49-97-CF-1899

STATE OF FLORIDA,

Plaintiff,

v. Honorable Scott Polodna

RICHARD VEZINA,

Defendant.
_____/

DEFENDANT'S MOTION TO SET ASIDE PLEA AND VACATE SENTENCE

COMES NOW the Defendant, **RICHARD VEZINA**, by and through his undersigned attorney, and pursuant to FRCrP 3.850(a)(5), petitions this Honorable Court to enter its Order setting aside his Plea and vacating his sentence in the above styled cause and as grounds therefore would show:

FACTS

1. On February 20, 1998, the Defendant entered a Plea and was sentenced to probation for the offense of Possession of Cocaine. The Defendant

successfully completed his probationary sentence.

2. When the Defendant entered the Plea, there was no information with respect to the immigration consequences on the Plea form.

A copy of the transcript of the Plea and Sentencing is attached hereto and incorporated herein for all purposes as Exhibit "A".

3. As can be seen from the transcript, the trial judge made a fleeting reference to immigration consequences but did not fully inform the Defendant to comply with Rule 3.172(c)(8), which requires the Court to take the Plea and advise the Defendant in every case before the Plea of the possibility of deportation as a result of the conviction. The Court did not ask the Defendant if he understood that his plea could lead to deportation. The plea form contains no immigration warning. The judge, however, orally warned the Defendant: "I have to tell you that if you're not a citizen of the United States, this plea could be used to deport you." (T 4:8-10). The court in taking the plea must advise the defendant, in every case before plea, of the possibility of deportation as a result of the conviction. The court must go further and ask the defendant whether he *understands* this warning. This, the court failed to do.

4. At all times while this matter was pending and pursuant to reviewing the Plea form with his trial attorney, the Defendant's attorney

informed him that this Plea would not result in any immigration consequences.

5. The Defendant has now learned that the entry of the plea in this cause has denied him lawful permanent residence, nor can he obtain U. S. Citizenship. Further, as of October 26, 2006, the Defendant learned that he could be subject to deportation.

6. In September, 2007, the Defendant met with an attorney and was advised that the time for the filing of the motion for post conviction relief, pursuant to Rule 3.850 did not end until two years after the Defendant "obtained knowledge" of the consequences.

7. This situation involved affirmative misadvice by the Defendant's counsel, thus it is not subject to a Strickland standard for review.

8. The Defendant is a citizen of Canada who has lived in the United States for more than 22 years. He has been married to a United States citizen since 1996, and wants to become a lawful permanent resident of the United States.

9. In order to obtain lawful permanent resident status, the Defendant needs to vacate the 1998 conviction for possession of cocaine.

10. The Defendant was represented by Michael Entin, Esq., and Steve Jablon, Esq. The Defendant's counsel, Steven Jablon, Esq., who made the court appearance before this Honorable Court was aware the Defendant was not a U. S. Citizen. The Defendant specifically discussed the immigration consequences of the case with Mr. Entin who affirmatively advised the Defendant that the plea would not expose him to deportation.

11. The Defendant would not have entered a plea to this offense had he known the drug offense would subject him to deportation. This case arose out of an assault investigation. Assault is not a deportable offense, so long as a one year custody sentence is not imposed. The Defendant could have entered a plea to an assault charge instead of the possession charge, and thereby avoided deportation.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO SET ASIDE PLEA AND VACATE SENTENCE

The Defendant hereby files his Memorandum of Law in support of his Motion to Set Aside Plea and Vacate Sentence and states:

The proper method to obtain relief is by 3.850 motion. The two-year limitation period of rule 3.850

applies, and starts to run when the defendant has or should have had (whichever is earlier) knowledge of the threat of deportation based on the plea.

To make a sufficient allegation of violation of the rule, the defendant need not show that he probably would have been acquitted had he gone to trial, but only that he was prejudiced by the error. To show prejudice, the defendant must show that he did not know that the plea might result in deportation, that he was threatened with deportation as a result of the plea, and that had he known of the threat of deportation, he would not have entered the plea. Peart v. State, 756 So.2d 42 (Fla. 2000), reversing Peart v. State, 705 So.2d 1059 (Fla. 3d DCA 1998), approving Marriott v. State, 605 So.2d 985 (Fla. 4th DCA 1992).

In State v. Wiita, 744 So.2d 1232 (4th DCA 1999), the defendant pled in 1981 to lewd assault in return for a probationary sentence. He got 10 years probation. In 1988 he moved to withdraw his plea based on §943.043, the sexual offender reporting and publicity sections, and the court allowed him to withdraw his plea. Held: Court does not abuse discretion in allowing defendant to withdraw his plea. Where defendant pled to avoid publicity, and could not have known that years later a statute would be enacted that required posting his photo on the internet and notification to his children's school, the court properly finds a manifest injustice.

A claim that a plea was involuntary can be

raised in a 3.850 motion if the circumstances show that it could not have been raised on direct appeal following a motion to withdraw the plea. (See this case for discussion of when voluntariness can be raised in a 3.850 motion.) Dooley v. State, 789 So.2d 1082 (1st DCA 2001).

The fact that defendant affirmed in his plea colloquy that no promises were made to him does not conclusively rebut defendant's allegation in a 3.850 motion that counsel gave affirmative misadvice regarding the time he will serve. Rensoli v. State, 718 So.2d 1278 (3d DCA 1998).

Defendant is entitled to a hearing on his motion when he alleges counsel affirmatively told him that there could be no immigration consequences. Ghanavati v. State, 820 So.2d 989 (4th DCA 2002).

A plea is involuntary if induced by counsel's promises which are not fulfilled. Where counsel incorrectly told defendant he could obtain release from a life sentence, the plea may be involuntary. Ivey v. State, 775 So.2d 306 (2d DCA 1999).

When defendant alleges that he pled based on counsel's misadvice regarding the amount of actual time he would serve, the defendant need not also allege that he had viable defense or that he would have been acquitted or received a more favorable plea bargain.

The issue is not whether counsel was ineffective in some manner, but whether the plea was freely and intelligently entered. Because the issue is not one of ineffective assistance, the defendant need not show prejudice under Strickland.

(See this case for extensive analysis of post-conviction relief motions alleging misadvice concerning the amount of actual time a defendant will serve.) Brazeail v. State, 821 So.2d 364 (1st DCA 2002).

Affirmative misadvice regarding a collateral consequence of a plea is a sufficient basis to withdraw the plea. Designation as a sexual offender or sexual predator is a collateral consequence, and when counsel affirmatively tells defendant he will not be designated, the plea should be withdrawn. Gunn v. State, 841 So.2d 629 (2d DCA 2003).

Where defendant entered his pleas with the belief that he might escape PRR sentencing, and under subsequent interpretations of the PRR statute it became clear that PRR sentencing was mandatory, the defendant should be permitted to withdraw his plea. Johnson v. State, 834 So.2d 384 (2d DCA 2003).

A direct consequence is one that results in a definite, immediate, and largely automatic effect on the range of punishment.

While the applicability of the Act is not a direct consequence of the plea, because the consequence is so severe, the court is advised to inform defendant of that possibility.

Affirmative misadvice regarding collateral consequences will result in relief. Thus, where counsel told defendant that he would be released following his plea "almost immediately," and defendant is not released because the state filed for civil commitment, the defendant is entitled to a hearing on his motion. Watrous v. State, 793 So.2d 6 (2d DCA 2001).

Where, as here, defendant is erroneously informed by counsel that a collateral consequence of a plea will not apply to him, he is entitled to withdraw his plea.

Counsel told defendant that his picture would not be on the internet if he pled to lewd act. After the plea but before sentencing, he learned otherwise. Held: Court errs in refusing to allow the plea to be withdrawn. Graham v. State, 779 So.2d 604 (2d DCA 2001).

Failure to inform defendant of the immigration consequences of his plea requires that the plea be withdrawn in a 3.850 motion where defendant alleges he would not have pled had he known he would be deported. Benelhocine v. State, 787 So.2d 38 (2d DCA 2001).

Misadvice by counsel regarding the length of time defendant would actually serve is grounds for allowing a plea to be withdrawn. Alvarez v. State, 742 So.2d 849 (3d DCA 1999).

When defendant alleges that he pled based on misadvice of counsel and he seeks to withdraw his plea, due process requires an evidentiary hearing unless the record conclusively shows the defendant is entitled to no relief. Simeton v. State, 734 So.2d 446 (4th DCA 1999).

In State v. Green, 944 So.2d 208, 219 (October 25, 2006), the Florida Supreme Court imposed additional requirements on a defendant filing Rule 3.850 motions based on the court's failure to advise the defendant of the possibility of deportation as to allegations that must be included in the motion: "The motion must allege, in addition to the lack of a deportation warning, that the defendant would not have entered the plea if properly advised and that under current law the plea does render the defendant subject to being removed from the country at some point in the future." State v. Green, 944 So.2d 208, 219 (October 26, 2006). It held, however, "defendants whose cases are already final will have two years from the date of this opinion in which to file a motion comporting with the standards adopted today." *(Id.* at 219).

The two-year period does not begin to run until the defendant first learns of the threat of deportation. Dobi v. State, 780 So.2d 343 (Fla. DCA

2001)(in Peart v. State, 756 So.2d 42 (Fla. 2000), the state supreme court held a defendant who learned of the threat of deportation before April 13, 2000, when the Peart decision was filed, would have two years from that date to file a Rule 3.850 motion); Gray v. State, 774 So.2d 30 (Fla. DCA 2000)(two-year limit held applicable to claim court failed to inform defendant of possible deportation begins to run when defendant has or should have knowledge of the threat of deportation); Ayers v. State, 708 So.2d 318 (Fla. DCA 1998)(defendant entitled to relief in the interests of justice, through motion filed a few days late, where statute of conviction had been held unconstitutional).

The Affiant states that the factual allegations contained in this Motion are true and correct.

/S/
RICHARD VEZINA

STATE OF FLORIDA
COUNTY OF BROWARD

I HEREBY CERTIFY that on this day before me, an officer duly authorized in the State and County aforesaid tot take acknowledgments personally appeared, **RICHARD VEZINA**, to me known to be the person described in and who executed the foregoing instrument or produced Florida Drivers License as valid identification and he acknowledged before me that he executed same.

WITNESS my hand and seal in the State and County last aforesaid this 21st day of October 2008.

/S/
NOTARY PUBLIC
My Commission Expires:
02-08-2010
DIANE M. PERSTEN
Notary Public, State of Florida

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Facsimile to the Office of the State Attorney, No. 2 Courthouse, Suite 3500, Kissimmee, FL, 34741, this

22nd day of October, 2008.

/S/

CHRISTOPHER L. SMITH, ESQ.
390 North Orange Ave., Suite 2100
Orlando, FL 32801
TEL: 407-897-6888
FAX: 407-841-2889
Florida Bar No. 367461
Attorney for Defendant

IN THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff

vs.

RICHARD VEZINA,

Defendant
_____/

CASE NO.
CR97-1899

DIVISION
11-A

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and in response to "Defendant's Motion to Set Aside Plea and Vacate Sentence" filed on October 23, 2007, pursuant to Fla.R.Crim.P. 3.850, states as follows:

DEFENDANT'S CLAIM

Defendant alleges that his guilty plea to Possession of Cocaine in February of 1998 was involuntary because — although at the time he was properly informed by the judge pursuant to Fla.R.Crim.P. 3.172(c) (8) that he could be deported as a result of his plea — his attorney, Steven Jablon, had promised/affirmatively misadvised him

that there would be no "immigration consequences" as a result of his plea.

STATE'S RESPONSE

The undersigned recently became aware of Defendant's motion and the fact that his counsel has already set an evidentiary hearing on his motion without the Court's previously requiring the State to file a written response to the motion in order to determine whether a hearing is actually required. In reviewing the motion and its attached transcript of Defendant's plea and sentencing hearing, the State believes the motion should be summarily denied.

Initially, as noted, the judge who accepted Defendant.'s guilty plea did in fact advise Defendant before accepting it that if he were not a U.S. citizen, his guilty plea could be used to deport him. This is all a judge is required to do under Fla.R.Crim.P. 3.172(c) (8), regardless of whether Defendant now believes the rule also requires that the judge must go further to make sure a defendant also understands the advice. (Of course, some things are nonetheless obvious: a review of the immediate context of this advice from the judge as well as a review of the entire transcript of the plea and sentencing hearing clearly shows that Defendant was undoubtedly understanding what was being said and was giving appropriate answers to various questions. (Transcript of Plea and Sentencing (TPS)). Defendant also swore (TPS 2)

that he had read and understood his plea form and claimed to have had three years of college. (3-4) Further, nowhere in his motion does Defendant now claim to have "misunderstood" what the judge told him about potential deportation. He is also now apparently claiming - with no support - that Jablon's supposed misadvice trumps what the judge clearly told Defendant.

Defendant now also attempts to down-play the fact that he swore (TPS 2) to the judge - and specifically after his attorney's further question - that no one, obviously including Jablon, had promised him anything other than what the judge had said or was in/on the plea form in order to get him to enter his plea. (TPS 4). Defendant should not now be allowed to go behind his sworn representations to the judge or imply that he should be excused for apparently lying to the judge. *Stano v. State,* 520 So.2d 278, 280 (Fla. 1988). This itself should be conclusive refutation of his instant assertion that Jablon had made him assurances *not* on the plea form that led him to enter a plea which he otherwise would not have entered. (Without a copy of the plea form, it is "assumed" that the form does not indicate at any place that Defendant had been promised by Jablon or anyone else that the guilty plea would not result in any "immigration consequences") . (If in fact Jablon made such a promise, he must have apparently been correct based on the then-current immigration law, since Defendant had no concerns for over ten years after his plea. Immigration law and criteria for

deportation obviously change, and no attorney could make long-term (accurate) predictions). Thus the main purpose of Fla.R.Crim.P. 3.172(c) (8) would appear to be to tell defendants only of the *potential* for deportation and no more).

Beyond this, the State believes that Defendant's motion is legally insufficient under *State v. Green,* 944 So.2d 208 (Fla. 2006), which has finally attempted to put some time limitations on deportation claims. Importantly, Defendant does *not* claim that under current law he is presently subject to or has been threatened with deportation in the future - but only that he has "now learned" that his guilty plea from over eight years ago will deny him "lawful permanent residence" and U.S. citizenship - not that he will be deported. It is also somewhat humorous that Defendant now claims that he "learned" on October 26, 2006 - coincidentally the date of the *Green* opinion which instituted a 2-year deadline from the date of the opinion to file such motions, which Defendant beat by three days - (only) that he "could" be subject to deportation. That is insufficient. Defendant is not subject to nor threatened with deportation and is simply filing his motion as a potential safety measure 3 days before the deadline. He certainly does not swear in his motion that deportation proceedings have been instituted - presumably because they have not been.

The State believes the record conclusively refutes Defendant's claim that his guilty plea was

not voluntary. Further, the State believes the motion is legally insufficient under *State v. Green, supra.*

WHEREFORE, the State believes the motion should be summarily denied and that the evidentiary hearing set for December 16, 2008, should be cancelled.

I **HEREBY CERTIFY** that a true copy of the foregoing has been furnished by U.S. mail to Christopher L. Smith, Esquire, 390 N. Orange Ave., Suite 2100, Orlando, FL 32801, on the 9th day of December, 2008.

/s/
Wilson Green III, FBN 298972
Assistant State Attorney
415 N. Orange Ave.,
P.O. Box 1673
Orlando, FL 32801
(407)836-2406

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR OSCEOLA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

F E L O N Y
DIVISION 201
CASE NO.: CR97-1899

RICHARD VEZINA,

Defendant.
_____/

ORDER DENYING MOTION TO SET ASIDE PLEA AND VACATE SENTENCE

THIS CAUSE having come before the Court on this day, upon the Motion to Set Aside Plea and Vacate Sentence which was filed October 23, 2008, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that said motion is hereby DENIED.

DONE AND ORDERED in Chambers at Kissimmee, Osceola County, Florida this 16th day of December, 2008.

/s/
SCOTT POLODNA, Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by interoffice/U.S. Mail delivery to the Office of the State Attorney, via interoffice mail; and Christopher L. Smith, Esquire, via facsimile 407-841-2889, this 17th day of December, 2008.

/s/
Judicial Assistant

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR OSCEOLA COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA,

Plaintiffs, Honorable Scott Polodna

v. CASE NO. 49-97-CF-1899

RICHARD VEZINA,

Defendant.
_____/

DEFENDANT'S MOTION FOR REHEARING

COMES NOW the Defendant, **RICHARD VEZINA**, by and through his undersigned attorney, and pursuant to Rule 3.850(g), FRCrP, moves this Honorable Court to grant a Rehearing on the Motion to Set Aside Plea and Vacate Sentence in this cause and as grounds therefore would show:

1. This matter began pursuant to Defendant's Motion to Set Aside Plea and Vacate Sentence.

2. (a) The procedural history is as follows: Defendant filed a Motion to Set Aside Plea and Vacate Sentence on October 22, 2008.

(b) Subsequent to the Motion being filed, the Court granted an Evidentiary hearing in this matter which was scheduled for December 16, 2008.

(c) On or about December 10, 2008, the State filed a Response to Defendant's Motion for Post Conviction Relief.

(d) On December 15, 2005, while the undersigned was in a jury trial, the undersigned received an e-mail from the State seeking a continuance of the Hearing based upon the fact that they had not received sufficient notice and their witnesses were not subpoenaed.

(e) Subsequent to that e-mail, on December 17, 2008, undersigned counsel received an Order Denying Motion to Set Aside Plea and Vacate Sentence. There were no findings in the Order for the undersigned to determine why said Motion was denied without Hearing.

3. That response filed by the State to Defendant's Motion to Set Aside Plea and Vacate Sentence was based on two grounds:

(a) That the Court had provided sufficient warning regarding immigration consequences which, was contained in the transcript of the Plea;

(b) That the Defendant failed to state prejudice to warrant the granting of the Motion.

4. The Defendant's Motion to Set Aside Plea and Vacate Sentence is specifically predicated upon the ground that he received affirmative misadvice of counsel. This type of review is not subject to the Strickland standard and the only determination for the Court is to see if. in fact, affirmative misadvice occurred. The State does not allege any matters within their response which denies that the Defendant received affirmative rnisadvice from his attorney and as such, is entitled to an Evidentiary Hearing on that issue alone. Rensoli v. State, 718 So.2d 1278 (3rd DCA 1998).

5. The Defendant sufficiently alleged prejudice that resulted from the affirmative misadvice of counsel. The State, in their response, incorrectly represents that deportation is the only prejudice that could result from the affirmative misadvice from the attorney and therefore, his claim should be summarily denied, The immigration consequences are outlined in Defendant's Motion to Set Aside Plea and Vacate Sentence. This is further substantiated by the Affidavit from an expert witness detailing how the Plea affected the Defendant's immigration status here in the United States. A copy of said Affidavit is attached hereto and incorporated herein for all purposes as Exhibit "A".

6. It is clear from the case law in the State of Florida that misadvice by counsel regarding any issue which later turns out not to be

true and prejudices the Defendant in any manner entitles him to relief in this cause. Benelbocine v. State. 787 So.2d 38 (2nd DCA 2001). Further, the Defendant is entitled to an Evidentiary Hearing on his Motion when he alleges counsel affirmatively told him that there could be ***no*** immigration consequences for the entry of his Plea. Ghanavati v. State, 820 So.2d 989 (4th DCA 2002).

MEMORANDUM OF LAW

The state suggests that the court's boilerplate advice about possible deportation should "trump" defense counsel's advice concerning the actual immigration consequences of the case for the particular defendant. (Response 2.) The court gives exactly the same advice to every single defendant (even including U.S. citizen defendants), even though each defendant's immigration situation may be different, and the specific immigration consequences for each defendant may be different. It is proper for the court to give generalized advice, to raise a red flag about a damaging possible consequence, so the defendant and defense counsel can look into the danger, and see if it is really there. After ascertaining whether the particular defendant is indeed a foreign national subject to danger of deportation, competent defense counsel will look into it directly or by seeking advice from immigration counsel on the exact immigration consequences of the particular plea for the particular defendant, and then advise the defendant as to the actual immigration

consequences of this particular plea. If they are damaging defense counsel and the defendant can try to negotiate an immigration harmless disposition if possible. Then, defense counsel would presumably - based on the investigation of the immigration facts, and legal research into the immigration law or consultation with an expert - advise the client that this plea will not in fact result in deportation. Obviously, a reasonable defendant will place more confidence in this informed legal opinion, supported by the facts and law relating to his or her individual case, than in the court's generalized, blind, boilerplate advice given to all defendants, even U.S. citizens.

The majority rule in the different federal circuit courts of appeal and many states is that defense counsel's legal advice on the immigration consequences - if it is incorrect -can constitute ineffective assistance of counsel, requiring reversal of the conviction if prejudice is shown. Affirmative misadvice by defense counsel concerning immigration consequences constitutes a federal constitutional ground to set aside a conviction, in a majority of the circuits.[1] The prevailing federal rule[2] which must perforce apply as well in all state courts, holds that a conviction is legally invalid at the time it came into existence if it results from ineffective assistance of counsel in giving *affirmative misadvice* concerning the immigration consequences of the plea, so long as the error is prejudicial.[3]

See N. Tooby & I. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 11.70(D).

[2] *United State* v. *Couto,* 311 F.3d 179 (2d Cir. 2002) (defense counsel gave affirrnative misadvice by saying that a conviction would not trigger deportation, where in fact it was an aggravated felony triggering mandatory deportation); see also *Dmvlls-Morgan* v. *United States,* 765 F.2d 1534, 1541 (11thCir. 1985); *Holmes v. United States*, 876 F.2d 1545(11th Cir. 1989); *Ostrander* v. *Green,* 46 F.3d 347,355 (4th Cir, 1995), *overruled on other grounds, O'Dell* V. *Netherland,* 95 F.3d 214, 1222-23 (4th Cir. 1996)

[3] *United States v. Kwan,* 407 F.3d 1005, 1014 (9th Cir. 2005) (affirmative misadvice concerning adverse immigration consequences of a plea constitutes ineffective assistance of Counsel); see *In re Resendiz,* 25 Cal.4th 230 (2001) (reviewing federal authorities on this point, and applying them in a state case).

The giving of the court's generalized advice, pursuant to a state statute, obviously cannot and does not excuse counsel's constitutional error in violation of the U.S. Constitution. See *In re Resendiz,* 25 Cal.4th 230, 240 - 242; 19 P.3d 1171, 1177-1179 (2001).

The State argues that a statement during the plea proceedings that no other promises have been made to induce the plea applies to defense counsel's legal advice concerning immigration consequences. (Response 3.) This is not true. *Bowers* v. *Saffle,* 216 P.3d 918, 925-26 (10th Cir. 2000); *Goodall v, United* States, 759 A.2d 1077. 1082 (D.C. App. 2000); *Hill v. Lockhart,* 894 F.2d 1009 (8th cir. 1999), *cert. denied,* 497 U.S. 1011 (1999). The language concerning promises always refers to direct penal consequences in criminal court, such as dismissal of charges or promises as to sentence; things the criminal court will impose as sentence. The reference to promises has nothing to do with what a different federal agency might or not do at some future time and place in a completely different proceeding. There is no reason to believe that anyone, much less the defendant, understood "promises" in that context to apply to defense counsel's legal advice concerning the immigration consequences of the plea.

The State argues that if defense counsel made that promise, it must have been correct at the time, because Mr. Vezina had no concerns for over 10 years after the plea was entered. (Response 3.)

This is not true. Mr. Vezina believed defense counsel's incorrect statement that the Plea would in fact not result in his deportation. He never learned that this advice was wrong until late in 2006. The evidence in support of the motion establishes that defense counsel's immigration advice was mistaken under the law at the time of the plea. The State has produced no evidence, and only a false inference, to the contrary.

The State says the main purpose of the rule is to tell the defendant the potential for deportation. (Response 3.) This is correct. Once so informed, the defendant and defense counsel- as indicated above - will see whether the danger applies to the specific defendant and specific plea and try to avert it, and defense counsel will go beyond the court's generalized advice and tell the client what the situation is in his or her specific case. See point 1, above.

The State argues the motion is legally insufficient under *Green*. (Response 3-4.) The *Green* decision, however, has no application to a claim of ineffective assistance of counsel, such as the claim raised here. Its application is limited to claims of violation of the rule.

The State claims that Mr. Vezina is not threatened with deportation, but simply filing the motion as a safety measure three days before the deadline. (Response 4.) The State. however, confuses deportation with inadmissibility. The rule

merely requires the court to warn the defendant about the possibility of deportation. Counsel's obligation to give accurate immigration advice - if counsel gives such advice at all - is not so limited. There are many different forms of damaging immigration consequences that may be triggered by criminal convictions. Chief among them are (a) deportation (where one is thrown out of the country after first being legally admitted), and (b) inadmissibility (where a person is barred - as Mr. Vezina is barred - from obtaining Lawful Permanent Resident status or barred from entry into the U.S. from abroad). The second consequence is the one causing damage to Mr. Vezina. As the evidence in support of the motion establishes, this conviction forces the immigration authorities to deny his application for Lawful Permanent Resident status, after which he will be removed from the country for lack of legal status. 'Technically this is not "deportation" but it amounts to the same thing, and he is certainly threatened with it as a result of this conviction since it is absolutely certain eventually to occur. This was proven in the evidence submitted in support of the Motion.

WHEREFORE, the Defendant prays this Honorable Court grant a Re-Hearing on this matter and set an Evidentiary Hearing to determine the validity of the Motion.

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by Facsimile/Hand-Delivery/U.S. Mail to Wilson Green, Esq., Assistant State Attorney, P.O. Box 1673, Orlando, FL, 32802-1673, this 23rd day of December 2008.

/S/

CHRISTOPHER L. SMITH, ESQ.
390 North Orange Ave., Suite 2100
Orlando, FL 32801
TEL: 407-897-6838
FAX: 407-841-2889
Florida Bar No. 367461
Attorney for Defendant

IN THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff.

vs. CASE No. CR97-1899

RICHARD VEZINA,

DIVISION 11

Defendant.
_____/

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR REHEARING

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and in response to Defendant's Motion for Rehearing following the Court's summary denial of his Motion to Set Aside Plea and Vacate Sentence filed pursuant to Fla.R.Crim.P. 3.850(a)(5), states as follows:

The State of course relies on its previous written response to Defendant's original motion in addition to this response. Further, the State includes the following general discussion:

The 5th DCA has made it clear that if a defendant does not file a post-sentencing motion to

withdraw plea, all issues are waived concerning the plea proceedings, and a 3.850 motion alleging an involuntary plea must be based on the collateral claim of ineffective assistance of counsel. *See Rogers v. State,* 864 So.2d 521 (Fla. 5th DCA 2004); *Barnhill v. State,* 828 So.2d 405 (Fla. 5th DCA 2002); *Jackson v. State*, 801 So.2d 1024 (Fla. 5th DCA 2001).

While an involuntary plea is thus a recognized ground for postconviction relief, in *Mikenas v. State,* 460 So.2d 359 (Fla. 1984), the Florida Supreme Court held that a defendant has the burden of showing that his plea was not knowing or voluntary. *See also, Smothers v. State,* 555 So.2d 452 (Fla. 5th DCA 1990).

Furthermore, an allegation that a plea was involuntary or was based on a misunderstanding or mistake can be refuted by a written plea agreement or plea transcript which conclusively establishes the defendant's understanding and that the plea was not coerced. *See Knowles* V. *State,* 582 So.2d 167 (Fla. 1st DCA 1991); *Rackley v. State,* 571 So.2d 533 (Fla. 1st DCA 1990) .

Additionally, such a motion should assert that were it not for counsel's ineffective assistance, that a defendant would not have entered his plea but would have *insisted* on a trial. *Brown v. State,* 943 So.2d 899 (Fla. 5th DCA 2006).

A reading of Defendant's original motion

confirms that his argument was that he was misadvised by his counsel that his guilty plea in this case would not result in any "immigration consequences." However, he went on to specifically indicate (in paragraph 10) that his counsel had (wrongly) advised him that the plea would not "expose him to *deportation.*" As noted in the State's original response, Defendant has not asserted that he is actually subject to or threatened with deportation, but only that he cannot obtain permanent residence or U.S. citizenship. When Defendant entered his plea, he had been clearly told by the judge that his guilty plea could be used to deport him. Defendant also swore that he had been promised nothing (off-record) to induce an otherwise voluntary plea.

The State is a bit confused by Defendant's motion for rehearing because he now seems to have changed his tack. He now appears to say that the basis of his original motion had nothing to do with whether the judge's deportation warning was sufficient or insufficient, although he obviously argued such in paragraph 3 and in his memorandum. Yet he now also argues that while not technically "deportation," the denial of permanent residence/citizenship "amount(s) to the same thing." But, as noted, in his original motion the claim is specifically made that his counsel misadvised Defendant that his plea would not expose him (only) to "deportation." (This point is further confirmed by Defendant's instant motion (at page 6) where he writes, "Mr. Vezina believed

defense counsel's incorrect statement that the Plea would in fact not result in his *deportation."* (Emphasis added). Defendant also now incongruously states that *State v. Green,* 944 So.2d 208 (Fla. 2006) has nothing to do with his claim, although he obviously referred to related cases in his original motion (such as *Peart)* and clearly alluded to the exact date of the *Green* opinion in arguing that his motion was timely.

Regardless, it is telling that Defendant has never claimed that his counsel specifically told him, in addition to not being exposed to deportation, that he would never be denied permanent residence or citizenship. This is not meaningless semantics, particularly when the judge had told Defendant his plea could be used to deport him.

If in fact Defendant understood the alleged advice of his lawyer about not being deported to also include permanent residency or citizenship - although, as noted, he never alleges hiscounsel told him that it did - maybe Defendant should be "estopped" and his claim refuted simply because, if in fact his plea was (in hindsight) truly involuntary only because it was of paramount importance that he become a permanent U.S. resident or citizen, he obviously made no effort to become either one during the many intervening years after his guilty plea. Such inaction would seem to belie the genuineness of Defendant's claim.

But even assuming Defendant was

affirmatively misadvised that he would not be deported as a result of his guilty plea - although, as noted, such advice may well have been correct when given, (and is such advice "guaranteed" *ad infinitum* regardless of future changes in deportation criteria?) - the fact is that the record shows that the judge properly put Defendant on notice that his guilty plea could be used to deport him. Thus even if his counsel, *arguendo,* gave him bad advice, the, judge corrected it and, at the very least, made Defendant aware that the potential of deportation existed, no matter what Defendant might have previously been told.

The State does believe that the judge's advice "trumped" the alleged misadvice of counsel. While the State has not found a case exactly on point regarding deportation, the principle is clearly enunciated in *Bond v. State,* 695 So.2d 778, 779 (Fla. 1st DCA 1997), where the defendant claimed he had been misadvised by counsel that he could later withdraw his no contest plea: "Any misunderstanding the defendant may have had about the plea after speaking with his lawyer was corrected by the information the trial court provided during the plea hearing." The same principle is also evident in *Leroux* V. *State,* 689 So.2d 235, 238 (Fla. 1996), where the court suggested that a claim of counsel's misadvice about the actual length of the defendant's sentence could be nipped in the bud if the trial court at the plea hearing were to tell a defendant that he may have to serve every day of his sentence regardless of anyone's 'computation,

because: "A defendant who is informed by the court during the plea colloquy that he may have to serve every day of a ten-year sentence could hardly reasonably rely on counsel's advice to the contrary." *See also Tommie v. State,* 945 So.2d 633, 636 (Fla. 4th DCA 2006) ("Thus, any deficiency in counsel's advice was cleared up by the information the court provided during the plea colloquy.") . Had the judge failed to advise Defendant of potential deportation as a result of the guilty plea, it would be a different situation and the State would likely have conceded that an evidentiary hearing was needed.

Thus, regardless of whether Defendant chose to take counsel's alleged misadvice over the judge's contrary advice and/or whether Defendant' simply took a calculated risk that he would not be deported, he made an informed decision and his plea was voluntary.

WHEREFORE, the State believes Defendant's Motion for Rehearing should be denied.

I HEREBY CERTIFY that a true copy of the foregoing has been, furnished by U.S. mail to Christopher L. Smith, Esquire, 390 N. Orange Ave., Suite 2100, Orlando, FL 32801, on the 9th day of December, 2009.

/s/

Wilson Green, III,
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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR OSCEOLA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, FELONY DIVISION 201

vs. CASE NO.: CR97-1899

RICHARD VEZINA,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

THIS CAUSE having come before the Court on this day, upon the Motion for Rehearing which was filed December 29, 2008, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that said motion is hereby DENIED.

DONE AND ORDERED in Chambers at Kissimmee, Osceola County, Florida this 4th day of February, 2009.

/s/
SCOTT POLODNA, Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by interoffice/U. S. Mail Delivery for the Office of the State Attorney, via interoffice mail; and Christopher L. Smith, Esquire, via facsimile 407-841-2889, this 5th day of February, 2009.

/s/
Judicial Assistant

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA

FIFTH DISTRICT JANUARY
TERM 2009

RICHARD VEZINA,

Appellant,

CASE NO. 5D09-859

STATE OF FLORIDA,

Appellee.
_____/

Decision filed June 23, 2009

3.850 Appeal from the Circuit
Court for Osceola County,
Scott Polodna, Judge.

Christopher L. Smith, Orlando, for
Appellant.

No Appearance for Appellee.

PER CURIAM.

AFFIRMED.

PALMER, C.J., LAWSON and EVANDER, JJ., concur.

IN THE SUPREME COURT OF THE STATE OF FLORIDA

RICHARD VEZINA, Petitioner,

v.

STATE OF FLORIDA, Respondent

PETITION FOR WRIT OF CERTIORARI

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August 20, 2009

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PETITION FOR WRIT OF CERTIORARI

Richard Vezina respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida for the Fifth District affirming the denial of Petitioner's Motions to Set Aside Plea and Rehearing by the Trial Court below.

BASIS FOR INVOKING JURISDICTION

Comes now Petitioner, **RICHARD VEZINA**, and pursuant to Article V, Section 3(b)(3), Florida Constitution, Fla. R. App. P. 9.100 and 9.030(a)(2)1A ii and the Sixth and Fourteenth Amendments to the United States Constitution, files this petition seeking review by this Court's certiorari jurisdiction in that the lower court affirmed an Order of he trial court denying the Petitioner's Motion for Post Conviction Relief and Rehearing without holding an evidentiary hearing.

FACTS UPON WHICH PETITIONER RELIES

This matter began pursuant to Defendant's Motion to Set Aside Plea and Vacate Sentence.

On February 20, 1998, the Petitioner entered

a Plea and was sentenced to probation for the offense of Possession of Cocaine. The Defendant successfully completed his probationary sentence.

When the Petitioner entered the Plea, there was no information with respect to the immigration consequences on the Plea form.

A transcript of the plea demonstrated that the trial judge made a fleeting reference to immigration consequences but did not fully inform the Petitioner to comply with Rule 3.172(c)(8), which requires the Court to take the Plea and advise the Defendant in every case before the Plea of the possibility of deportation as a result of the conviction.

The Court did not ask the Defendant if he understood that his plea could lead to deportation. The plea form contains no immigration warning. The judge, however, orally warned the Defendant: "I have to tell you that if you're not a citizen of the United States, this plea could be used to deport you." (T 4:8-10). The court in taking the plea must advise the defendant, in every case before plea, of the possibility of deportation as a result of the conviction. The court must go further and ask the defendant whether he *understands* this warning. This, the court failed to do.

At all times while this matter was pending and pursuant to reviewing the Plea form with his trial attorney, the Petitioner's attorney informed

him that this Plea would not result in any immigration consequences.

The Petitioner has now learned that the entry of the plea in this cause has denied him lawful permanent residence, nor can he obtain U. S. Citizenship. Further, as of October 26, 2006, the Petitioner learned that he could be subject to deportation.

In September, 2007, the Petitioner met with an attorney and was advised that the time for the filing of the motion for post conviction relief, pursuant to Rule 3.850 did not end until two years after the Petitioner "obtained knowledge" of the consequences.

This situation involved affirmative misadvice by the Petitioner's counsel, thus it is not subject to a Strickland standard for review.

The Petitioner is a citizen of Canada who has lived in the United States for more than 22 years. He has been married to a United States citizen since 1996, and wants to become a lawful permanent resident of the United States.

In order to obtain lawful permanent resident status, the Petitioner needs to vacate the 1998 conviction for possession of cocaine.

The Petitioner was represented by Michael Entin, Esq., and Steve Jablon, Esq. The Petitioner's

counsel, Steven Jablon, Esq., who made the court appearance for the plea was aware the Petitioner was not a U. S. Citizen. The Petitioner specifically discussed the immigration consequences of the case with Mr. Entin who affirmatively advised the Defendant that the plea would not expose him to deportation.

The Petitioner would not have entered a plea to this offense had he known the drug offense would subject him to deportation. This case arose out of an assault investigation. Assault is not a deportable offense, so long as a one year custody sentence is not imposed. The Petitioner could have entered a plea to an assault charge instead of the possession charge, and thereby avoided deportation.

The procedural history is as follows: Defendant filed a Motion to Set Aside Plea and Vacate Sentence on October 22, 2008. Subsequent to the Motion being filed, the Court granted an Evidentiary Hearing in this matter which was scheduled for December 16, 2008. On or about December 10, 2008, the State filed a Response to Defendant's Motion for Post Conviction Relief. On December 15, 2008, while the undersigned was in a jury trial, the undersigned received an e-mail from the State seeking a continuance of the Hearing based upon the fact that they had not received sufficient notice and their witnesses were not subpoenaed. Subsequent to that e-mail, on December 17, 2008, undersigned counsel received an Order Denying Motion to Set Aside Plea and

Vacate Sentence. There were no findings in the Order for the undersigned to determine why said Motion was denied without Hearing. Nor, was there any explanation as to why a hearing had been scheduled but was no longer to be held.

The response filed by the State to Defendant's Motion to Set Aside Plea and Vacate Sentence was based on two grounds:

(a) That the Court had provided sufficient warning regarding immigration consequences which was contained in the transcript of the Plea;

(b) That the Defendant failed to state prejudice to warrant the granting of the Motion.

The Petitioner filed a timely Motion for Rehearing. The trial court below denied the Motion for Rehearing and the Petitioner filed a timely Notice of Appeal on February 26, 2009. On June 23, 2009, the Fifth District Court of Appeal returned a Per Curiam Affirmed opinion which was rendered on July 15, 2009.

ISSUE

Whether criminal defense counsel's affirmative misadvice to the defendant concerning the immigration consequences of a plea constitutes ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution, as applied to the statues by the

Fourteenth Amendment, rendering the guilty plea which was induced by that faulty advice legally invalid?

ARGUMENT

The Defendant's Motion to Set Aside Plea and Vacate Sentence is specifically predicated upon the ground that he received affirmative misadvice of counsel. This type of review is not subject to the Strickland standard and the only determination for the Court is to see if, in fact, affirmative misadvice occurred. The State does not allege any matters within their response which denies that the Petitioner received affirmative misadvice from his attorney and as such, Petitioner is entitled to an Evidentiary Hearing on that issue alone. Rensoli v. State, 718 So.2d 1278 (3rd DCA 1998).

The Petitioner sufficiently alleged prejudice that resulted from the affirmative misadvice of counsel. The State, in their response, incorrectly represents that deportation is the only prejudice that could result from the affirmative misadvice from the attorney and therefore, his claim should be summarily denied. The immigration consequences are outlined in Petitioner's Motion to Set Aside Plea and Vacate Sentence. The consequences are further substantiated by an Affidavit from an expert witness detailing how the Plea affected the Petitioner's immigration status here in the United States.

It is clear from the case law in the State of Florida that misadvice by counsel regarding any issue which later turns out not to be true and prejudices the Petitioner in any manner entitles him to relief in this cause. Benelhocine v. State, 787 So.2d 38 (2nd DCA 2001). Further, the Petitioner is entitled to an Evidentiary Hearing on his Motion when he alleges counsel affirmatively told him that there could be no immigration consequences for the entry of his Plea. Ghanavati v. State, 820 So.2d 989 (4th DCA 2002).

The state suggests that the court's boilerplate advice about possible deportation should "trump" defense counsel's advice concerning the actual immigration consequences of the case for the particular defendant. The court gives exactly the same advice to every single defendant (even including U.S. citizen defendants), even though each defendant's immigration situation may be different, and the specific immigration consequences for each defendant may be different. It is proper for the court to give generalized advice, to raise a red flag about a damaging possible consequence, so the defendant and defense counsel can look into the danger, and see if it is really there. After ascertaining whether the particular defendant is indeed a foreign national subject in danger of deportation, competent defense counsel will look into it directly or by seeking advice from immigration counsel on the exact immigration consequences of the particular plea for the particular defendant, and then advise the

defendant as to the actual immigration consequences of this particular plea. If they are damaging, defense counsel and the defendant can try to negotiate an immigration harmless disposition if possible. Then, defense counsel would presumably - based on the investigation of the immigration facts, and legal research into the immigration law or consultation with an expert - advise the client that this plea will not in fact result in deportation. Obviously, a reasonable defendant will place more confidence in this informed legal opinion, supported by the facts and law relating to his or her individual case, than in the court's generalized, blind, boilerplate advice given to all defendants, even U.S. citizens.

The majority rule in the different federal circuit courts of appeal and many states is that defense counsel's legal advice on the immigration consequences - if it is incorrect - can constitute ineffective assistance of counsel, requiring reversal of the conviction if prejudice is shown. Affirmative misadvice by defense counsel concerning immigration consequences constitutes a federal constitutional ground to set aside a conviction, in a majority of the circuits.[1] The prevailing federal rule[2] which must perforce apply as well in all state courts, holds that a conviction is legally invalid at the time it came into existence if it results from ineffective assistance of counsel in giving *affirmative misadvice* concerning the immigration consequences of the plea, so long as the error is prejudicial.[3]

The giving of the court's generalized advice, pursuant to a state statute, obviously cannot and does not excuse counsel's constitutional error in violation of the U.S. Constitution.

[1] See N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS § 6.18 (2004).

[2] *United States* v. *Couto,* 311 F.3d 179 (2d Cir. 2002) (defense counsel gave affirmative misadvice by saying that a conviction would not trigger deportation, where in fact it was an aggravated felony triggering mandatory deportation); see also *Dmvlls-Morgan* v. *United States,* 765 F.2d 1534, 1541 (11th Cir. 1985); *Holmes v. United States,* 876 F.2d 1545 (11th Cir. 1989); *Ostrander* v. *Green,* 46 F.3d *347,355* (4th Cir. 1995), *overruled on other grounds, O'Dell v. Netherland,* 95 F.3d 214,1222-23 (4th Cir. 1996); *Bowers* v. *Saffie,* 216 F.3d 918, 925-26 (10th Cif. 2000); *Goodall v. United States,* 759 A.2d 1077. 1082 (D.C. App. 2000); *Hill* v. *Lockhart,* 894 F.2d 1009 (8th cir. 1999), *cert. denied,* 497 U.S. 1011 (1999).

[3] *United States v. Kwan,* 407 F.3d 1005, 1014 (9th Cir. 2005) (affirmative misadvice concerning adverse immigration consequences of a plea constitutes ineffective assistance of counsel); see *In re Resendiz,* 25 Cal.4th 230 (2001) (reviewing federal authorities on this point, and applying them in a state case).
See *In re Resendiz,* 25 Cal.4th 230, 240 - 242; 19 P.3d 1171, 1177- 1179 (2001).

The State argued that a statement during the plea proceedings that no other promises have been made to induce the plea applies to defense counsel's legal advice concerning immigration consequences. This is not true. The language concerning promises always refers to direct penal consequences in criminal court, such as dismissal of charges or promises as to sentence; things the criminal court will impose as sentence. The reference to promises has nothing to do with what a different federal agency might or might not do at some future time and place in a completely different proceeding. There is no reason to believe that anyone, much less the defendant, understood "promises" in that context to apply to defense counsel's legal advice concerning the immigration consequences of the plea.

The State argued that if defense counsel made that promise, it must have been correct at the time, because Mr. Vezina had no concerns for over 10 years after the plea was entered. This is not true. Mr. Vezina believed defense counsel's incorrect statement that the Plea would in fact not result in his deportation. He never learned that this advice was wrong until late in 2006. The evidence in support of the motion establishes that defense counsel's immigration advice was mistaken under the law at the time of the plea. The State has produced no evidence, and only a false inference, to the contrary.

The State asserted that the main purpose of the rule is to tell the defendant the potential for deportation. This is correct. Once so informed, the defendant and defense counsel - as indicated above - will see whether the danger applies to the specific defendant and specific plea and try to avert it, and defense counsel will go beyond the court's generalized advice and tell the client what the situation is in his or her specific case.

The State argued the motion was legally insufficient under *Green.* The *Green* decision, however, has no application to a claim of ineffective assistance of counsel, such as the claim raised here. Its application is limited to claims of violation of the rule.

The State claimed that Mr. Vezina is not threatened with deportation, but simply filing the motion as a safety measure three days before the deadline. The State, however, confuses deportation with inadmissibility. The rule merely requires the court to warn the defendant about the possibility of deportation. Counsel's obligation to give accurate immigration advice - if counsel gives such advice at all - is not so limited. There are many different forms of damaging immigration consequences that may be triggered by criminal convictions. Chief among them are (a) deportation (where one is thrown out of the country after first being legally admitted), and (b) inadmissibility (where a person is barred - as Mr. Vezina is barred - from obtaining Lawful Permanent Resident status or barred from

entry into the U.S. from abroad). The second consequence is the one causing damage to Mr. Vezina. As the evidence in support of the motion establishes, this conviction forces the immigration authorities to deny his application for Lawful Permanent Resident status, after which he will be removed from the country for lack of legal status. Technically, this is not "deportation," but it amounts to the same thing, and he is certainly threatened with it as a result of this conviction since it is absolutely certain to occur. This was proven in the evidence submitted in support of the Motion.

There can be no doubt that a lawyer's *misadvising* the client on legal questions of importance to the plea, without exercising even reasonable diligence to investigate the issue, is "objectively unreasonable" in almost all circumstances. "Counsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness." United States v. Couto, 311 F.3d at 187 (2bd Cir. 2002). The overwhelming majority of courts that apply the collateral consequences rule to failure-to-advise claims also hold that that rule does not apply where counsel misadvises the defendant.

A criminal defendant is highly vulnerable in a criminal prosecution. As noted above, "the average defendant does not have the professional legal skill to protect himself when brought before a

tribunal with power to take his life or liberty....." Zerbst, 304 U.S. at 462-63. Guilty pleas in particular, because they result in convictions, demand "the utmost solicitude" for the defendant. Nixon, 543 U.S. at 187. "[I]ntellingent assessment of he relative advantages of pleading guilty is frequently impossible without the assistance of any attorney," Brady, 397 U.S. at 749 n.6., including an independent examination of the law as applied to the facts. Von Moltke, 332 U.S. at 721. Thus, the defendant necessarily relies on the accuracy of therepresentations defense counsel makes regarding the law and its applications, for typically the defendant lacks the wherewithal to question them.

Deportation consequences will commonly be important to plea decisions, and in some circumstances the most important factor. St. Cyr, 533 U.S. at 322. Thus, it is a breach of trust and of the special relationship between counsel and client for counsel to render advice, without even investigating its accuracy, on matters so critical to the defendant in deciding whether to plead guilty to a felony and forfeit his constitutional rights. The Ninth Circuit so concluded in Kwan, reasoning that even if counsel did not have to give the defendant advice about deportation, misleading him on the subject was "objectively unreasonable under contemporary standards for attorney competence." 407 F.3d at 1015-16. Having held himself out as competent to provide advice on the subject, counsel violated "a basic rule of professional conduct that a

lawyer must maintain competence by keeping abreast of changes in the law and its practice." *Id.* At 1016 (citing Model Rules of Prof'l Conduct R. 1.1 [6]).

False representations that the attorney freely makes on legal matters distort the defendant's decision to plead guilty. It is common to draw a line in the law based on the decision to speak in circumstances where one induces reliance. For example, absent an independent duty to speak, silence will not give rise to liability for negligent misrepresentation. But if a professional supplies false information that induces justifiable reliance by others, he will be liable for failing to exercise due care. *Restatement (Second) of Torts § 552 (1965).* On the same principle, if a lawyer supples false information about deportation consequences that affects the defendant's decision to plead guilty, the lawyer has been ineffective in assisting the defendant, even if he had no duty to investigate collateral consequences in the first place. "One would not suppose that the collateral consequence rule ... would apply in a situation in which defendant's guilty plea was induced by actual misadvice respecting some collateral consequence when that consequence was of substantial importance to the defendant." Mott v. State, 407 N.W.2d at 583-84 (internal quotation marks omitted). "If the defendant's pleas were made in reasonable reliance upon the advise or representation of his attorney, which advice or representations demonstrated incompetence, then it

can be said that the defendant's pleas were not voluntary[.]" People v. Correa, 485 N.E.2d at 310; *accord* Strader, 611 F.2d at 65. *See also* Evitts v. Lucey, 469 U.S. 387 (1985) (State has no obligation to provide appeal, but must assure effective assistance of counsel if appeal is provided).

See Santobello v. New York, 404 U.S. 257, 262 (1971). In Brady, the Court recognized that misrepresentation by the court, the prosecutor, or his own counsel that induces a plea materially invalidates it. 397 U.S. at 755. In the same vein, false representations by incompetent counsel on the critical issue of deportation that prejudicially induce a guilty plea should give rise to a Sixth Amendment claim.

CONCLUSION

Affirmative misadvice by counsel as to the immigration consequences of the entry of a plea violates the Sixth and Fourteenth Amendments of the Unite States Constitution. Where evidence of said misadvice is uncontroverted, an evidentiary hearing should be held.

This Court should vacate the ruling of the Fifth District Court of Appeal and Trial Court and remand this matter for an evidentiary hearing.

Respectfully submitted,

/S/

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Florida Bar No. 367461
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was furnished by U.S. Mail to Bill McCollum, Attorney General, State of Florida, The Capitol PL-01, Tallahassee, FL, 32399-1050 and the original has been furnished by overnight delivery via FedEx to the Honorable Thomas Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL, 32399-6556, this 20th day of August, 2009.

/S/

CHRISTOPHER L. SMITH, ESQ.
COUNSEL FOR PETITIONER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is proportionally spaced 14 point Times New Roman.

/S/

CHRISTOPHER L. SMITH, ESQ.
COUNSEL FOR PETITIONER

SUPREME COURT OF FLORIDA

WEDNESDAY, AUGUST 26, 2009

CASE NO.: SCO9-1537

Lower Tribunal
No(s).: 5D09-859,
49-97-CF-1899

RICHARD VEZINA vs. STATE OF FLORIDA

Petitioner(s)

Respondent(s)

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. See Jenkins v. State, *385* So. 2d 1356 (Fla. 1980).

No motion for rehearing will be entertained by the Court.

A True Copy

Test:

/s/
Thomas D. Hall
Clerk, Supreme Court

jn
Served:

HON. SUSAN WRIGHT, CLERK
CHRISTOPHER L. SMITH
HON. BILL MCCOLLUM
HON. SCOTT DAVID POLODNA, JUDGE
HON. MALCOM THOMPSON, CLERK